IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 71-711

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ANITE STATE JOINT BOARD, TEXTILE WORKERS UNION OF AMERICA, LOCAL 1029, AFL-CIO.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

IEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA.

MILTON SMITH,
General Counsel,

O. F. WENZLER,
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H. Street, N. W.,
Washington, D. C.,

JERRY KRONENBERG,
BOROVSKY, EHRLICH & KRONENBERG,
120 South LaSalle Street,
Chicago, Illinois 60603,

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,
Attorneys for the Amicus Curiae.

INDEX.

Authorities Cited.

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BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA.

INTEREST OF THE AMICUS CURIAE.[1]

The Chamber of Commerce of the United States is a federation consisting of a membership of over thirty-seven hundred (3700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest

1. This Brief is filed with the express written consent of all parties, pursuant to the Rules of this Court.

association of business and professional organizations in the United States.

The Chamber has appeared as *amicus curiae* in this Court in a wide range of labor relations matters which have substantially affected the legitimate and vital interests of its members. Examples of such cases in which the Chamber has participated include *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, ... U. S. ....., 30 L. Ed. 2d 341 (1971); *Boy's Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *N. L. R. B.* v. *Burns International Security Services, Inc.*, ... U. S. ....., 80 LRRM 2225 (1972); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99 (1970).

The issue presented here,—whether a union violates the National Labor Relations Act by fining employees who resigned from union membership during a strike and thereafter returned to work,—is particularly important to the Chamber's members, many of which are engaged in commerce and are subject, together with their employees, to the provisions of the National Labor Relations Act. The extent to which unions can discipline—and enforce such discipline against—their members affects employers' ability to be free of the enormously destructive consequences of strikes; it affects their employees' right to refrain from engaging in union activity, pursuant to the right guaranteed them in Section 7 of the Act; it involves the basic question to all parties governed by that Act as to where the balance should be struck between an individual's freedom of choice, a union's interest in solidarity and a united front, and an employer's need to be free of the jeopardy of coerced strike conduct.

The practical importance of these matters to the Chamber's members as well as to all other parties and their conceptual importance in the enforcement of Congress' legislative design impels the Chamber respectfully to submit its views to the Court.

SUMMARY OF ARGUMENT.

A. Congress' purpose in enacting Section 8(b)(1)(A) of the Act and amending Section 7 to guarantee employees "the right to refrain from any or all [union] activities" was expressly to prevent unions from coercing employees to engage in strike conduct against their will. In permitting unions to expel from membership those persons who, as by refusing to strike, fail to abide by the unions' internal requirements, Congress effected a balance between employees' freedom from coercion to strike and unions' need for a means to secure solidarity in the use of their strike weapon. Any further limitation of employees' right not to strike contravenes Congress' intent. This Court's decision in *N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967), permitting unions to impose judicially enforceable fines on its members, adversely affected the legislative balance of rights created by the Act. Any further imbalance would, in effect, constitute a judicial repeal of the guarantees contained in Section 7 of the Act.

B. Granting unions the right to fine non-members for refusing to strike would not only create such an imbalance, but would adversely affect Congress' intent to promote free collective bargaining in which "... the results of the contest [are left] to the bargaining strengths of the parties." *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970). Inherent in this concept is the premise that the nature of the harm which a strike,—a statutorily-sanctioned form of economic warfare,—imposes on the parties should affect their bargaining posture and the ultimate terms upon which they resolve their dispute. To permit unions to fine non-members, thus in effect preventing them from responding to the economic pressures which their strike set in motion, constitutes an artificial restraint on the process of collective bargaining.

C. In order to satisfy their legitimate needs, unions do not require the authority to discipline those who elect not to remain union members. Absent such an extension of traditional union powers, the substantial weapons which unions already possess to expel and fine their members are more than adequate to encourage solidarity and obedience to the majority's will. To permit unions the further power to fine non-members would afford them not merely an effective strike weapon, but the means by which to compel the success of their strike objectives. Neither the terms of the statute, its legislative history nor sound policy warrant or permit such a result.

D. Reliance on such concepts as waiver and estoppel as an analytical device for determining strikers' statutory rights is inappropriate. Such concepts presuppose conduct knowingly and voluntarily undertaken. However, the act of joining a union, as well as the duties and obligations imposed by the union's by-laws and constitutions, are not voluntarily done or assumed in any realistic sense; an employee desiring to have a voice in the collective bargaining process in which a union is the employees' exclusive agent has no option but to join, the terms on which the employee joins are not subject to negotiation, and the employee has no election as to which and how many by-law obligations he shall assume. Moreover, it is realistically unwarranted to presume either that any striker intends a strike vote to represent an unqualified intention to strike for an unlimited time, or that any other striker relies on another's strike vote as constituting such an unqualified commitment.

ARGUMENT.

Within the last several years, this Court has on three occasions elected to hear and decide cases involving the conflict between a union's attempts to impose discipline upon employees and those employees' statutory right to be free of the coercion inherent in such discipline. In *N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967), the Court upheld a union's right to fine and judicially enforce that fine against its members who returned to work during an authorized strike; in *N. L. R. B.* v. *Industrial Union of Marine and Shipbuilding Workers*, 391 U. S. 418 (1968), the Court held to be violative of Section 8(b)(1)(A) of the Act a union's action in expelling from membership and fining various of its members who had filed unfair labor practice charges against the union; and in *Scofield* v. *N. L. R. B.*, 394 U. S. 423 (1969), the Court approved a union's effort to enforce member-employees' adherence to union imposed production and pay ceilings by fining those who violated the union's standards and seeking judicial enforcement of the fines.

Each of these cases involved a union's imposition of fines against its members and required a balancing of the unions' interests in institutioned solidarity with their member-employees' right, guaranteed them in Section 7 of the Act, to take action disapproved by the union.

The instant case, being the fourth in the series and the third spawned by this Court's sharply divided decision in *Allis-Chalmers*, goes far beyond the others in that the union sought here to impose its discipline not upon its members but upon those who, disapproving the union's conduct and objectives, resigned their membership during an authorized strike and thereafter returned to work. In approving the imposition and enforcement of the union's fines in this case,

the court below has essentially emasculated the content of Section 7 as applied to such dissenting employees; that result so restructures the balance between collective interest and individual freedom as virtually to accord recognition only to the former. In doing so, the court misconceived the will of Congress, the content and design of the statute, the legitimate practical needs of unions, and the nature of the duty which union members owe their fellows.

A.

The Union's Effort to Discipline Non-Members, Following Their Resignation from the Union, Violated the Act.

1. Congress Intended to Afford Employees Maximum Protection from Coercion to Engage Involuntarily in Strike Activity.

Section 7 of the Act, which provides that "employees shall have the right to self-organization, to form, join or assist labor organizations . . . and shall also have the right to refrain from any or all of such activities", was enacted, among other reasons, so that employees would not be compelled to engage in strikes. According to Senator Taft, surely the preeminent authority on the content of the statute, the inclusion in the 1947 amendments to the Act of the language "and shall also have the right to refrain from any or all of such activities" was an attempt by the Conference Committee to

> "... make the prohibition contained in Section 8(b)(1) apply to coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or picket line."[2]

In the debates concerning Section 8(b)(1)(A) itself, which prohibits unions from restraining or coercing employees in the exercise of rights guaranteed in Section 7,

2. 93 Cong. Rec. 6859, II Legislative History of the Labor Management Relations Act of 1947, 1623 (hereafter Leg. Hist.).

Senator Taft explicated the effect of that Section in response to the objections of those who feared 8(b)(1)(A) would impair the effectiveness of strikes:

> "I can see nothing in the pending measure which . . . would outlaw strikes . . . It would not outlaw anybody striking who wanted to strike . . . All it would do would be to outlaw such restraint and coercion as would prevent people from going to work, if they wished to go to work".[3]

Accordingly, the Congressional concern to free employees from coercion which would force them to engage in involuntary strike activity was sufficiently pronounced that it found expression both in the employees' bill-of-rights (Section 7) as well as in the Section prohibiting unions from infringing on those rights (Section 8(b)(1)(A)). In general, the context which framed these debates emphasized individual worker's need for the right to make individual choices concerning the scope and kind of union activities in which they would—or would not—engage, and a concomitant freedom from union coercion to act contrary to their beliefs and preferences.[4] While the matter of disciplinary fines imposed by unions does not appear to have been mentioned in any of the legislative debates, no party has, or could reasonably have, disagreed that "a fine is by nature coercive".[5]

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3. 93 Cong. Rec. 4436, II Leg. Hist. 1207.

4. Senator Taft's discussion of the purpose for enacting Section 8(b)(1)(A) included references to employees' right to be free of coercion from their unions which forced them to engage in undesired union activities. For example:

> "If there is anything clear in the development of labor union history in the past ten years, it is that more and more labor union employees have come to be subject to the orders of labor union leaders. The bill provides for the right of protest against arbitrary powers which have been exercised by some of the labor union leaders." (93 Cong. Rec. 4023, II Leg. Hist. 1028.)

5. *Local 138, Operating Engineers*, 148 NLRB 679, 682.

Taking these elements of legislative history, together with the express terms of the statute, it follows that there existed a Congressional intention to grant employees maximum freedom, otherwise consistent with the statute, to refuse to engage in strike activity and to make this right (codified in Section 7) effective by prohibiting unions from exerting such forms of coercion upon those employees as would make that right meaningless. Congress did create an exception to this grant of right in the proviso to Section 8(b)(1)(A) by permitting unions to expel from membership such employees whose conduct is deemed by the union to warrant such a penalty. It is at least arguable from the legislative history as well as the specific statutory language that, by conferring upon unions the unqualified right to control the matter of their membership, Congress thereby sought to effect a balance between an employee's right to refrain from strike activity and a union's competing interest in enforcing strike solidarity through effective membership discipline.

In its *Allis-Chalmers* decision, however, this Court, without denying the existence of the described legislative desire to protect employees from coerced strike activity, found the existence of a parallel legislative purpose to permit unions the right to control their "internal" affairs, including "internal" discipline, exempt from the prohibitions against "restraint" and "coercion" in Section 8(b)(1)(A) and the guarantees of Section 7.

In resolving these conflicting claims of right, the divided *Allis-Chalmers* Court gave no effect to that legislative history, *supra*, which supports the view that Congress sought to insulate employees from union coercion (other than in the form of statutory-sanctioned expulsion) to engage in strike activity. Nor did the Court's view that the union's right to expel from membership subsumes the right to impose judicially enforceable fines gives effect to the express

terms of Section 7 entitling employees to refrain from union activity; an employee who faces the jeopardy of an enforceable union fine for refusing to strike does not receive the benefit, which Senator Taft described would accrue from the combination of the enactment of Section 8(b)(1)(A) and the amendment to Section 7:

> "... to outlaw such restraint and coercion as would prevent people from going to work, if they wished to work."[6]

The principal point of this discussion is to suggest to the Court that even the *Allis-Chalmers* decision, in fixing the balance between an individual's freedom to resist engaging in strike activity and a union's competing interest in promoting a disciplined solidarity during a strike, has already gone farther in limiting the individual's freedom than the statute and its legislative history may be interpreted to have intended.[7] Whereas, in *Allis-Chalmers*, the union's coercion was confined to its members, in the instant case a union has attempted to extend even further its right to coerce, via fines, involuntary adherence to a strike.

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6. Cong. Rec. 4436, II Leg. Hist. 1207.

7. The decision in *Allis-Chalmers*, moreover, has given rise to a series of problems, such as the instant question as to whether unions may fine non-members; whether membership is "full" or "partial" or voluntary; whether members voted to strike or merely failed to oppose a strike or whether their votes reflected their personal intentions—and the ramifications of differing answers to these questions; whether membership may be terminated at will or may be limited by by-laws whose provisions no individual member can affect; whether fines are reasonable and the criteria which are appropriate to that judgment;—which can only result in substantial and continuing litigation and will necessarily deprive the parties of any confidence as to their rights in any given factual context. In order to avoid the legal quagmire which *Allis-Chalmers* has spanned and for all the other reasons stated herein, it is suggested that the Court should reconsider and reverse that holding.

The result sought in the instant case and the arguments stated in support have merit independent of any such reconsideration of *Allis-Chalmers*.

Even assuming the Court's continuing adherence to *Allis-Chalmers*, the Court should give effect here to the plain meaning of Section 7 and the legislative will it expresses. To permit unions to extend to non-members the coercion of judicially enforceable disciplinary fines would achieve a judicial repeal of Section 7 with respect to unionized employees.[8]

2. Union Discipline of Non-Members Is Inconsistent with the Intent of Congress and Decisions of This Court.

In *Scofield* v. *N. L. R. B.*, *supra*, this Court held that Section 8(b)(1)(A) does not reach a union's effort to enforce, through expulsion or in the courts, a properly adopted rule reflecting a legitimate union interest, which impairs no policy which Congress has inbedded in the labor laws, and which is reasonably enforced against "union members who are free to leave the union and escape the rule."[9]

Although *Scofield* did not involve a comparable conflict between statutory protections as was presented in *Allis-Chalmers*, a similar need to balance individual and institutional freedoms was required. With respect to the issue

8. The preeminent place of Section 7 in the entire statutory scheme has recently been recognized by this Court in *N. L. R. B.* v. *Nash-Finch Co.*, 404 U. S. 138 (1971), in which the Board was empowered to enjoin actions by the States which impinge upon rights granted in the Act.

9. *Scofield*, which involved a union's rule establishing production and pay ceilings, did not present a situation in which the union's discipline affected rights specifically granted employees in the labor laws. *Scofield* thus differed from both *Allis-Chalmers*, where the union's discipline collided with the express right to refrain from union activities conferred in Section 7 of the Act, and *Shipbuilding Workers*, in which the union's discipline inhibited employees' access to the N. L. R. B. as guaranteed in Section 10 of the Act. Despite this conceptional similarity between *Allis-Chalmers* and *Shipbuilding Workers*, this Court reached differing conclusions with respect to the propriety of the union discipline involved in the two cases as a result of the differences in the "legitimacy" of the union's objectives which gave rise to the curtailment of Section 7 rights which each case involved.

presented in the instant case,—a union's right to fine non-members,—the nature of the compromise reached in *Scofield* is relevant. For the Court in *Scofield* conditioned a union's right to impose discipline upon a concurrent right of employees to escape such discipline by relinquishing their union membership. This compromise, far from being inadvertent or incidental, is restated so frequently in the Court's decisions as to constitute a definitive statement of the Court's view:

"A union's rule . . . was therefore enforceable against *voluntary* union *members* by expulsion of a reasonable fine."[10]

"But as a union member, *so long as he chooses to remain one,* he is subject to union discipline."[11]

". . . Section 8(b)(1) leaves a union free to enforce a properly adopted rule which . . . is reasonably enforced against *union members who are free to leave the union and escape the rule.*"[12]

"The individual member may express his interest within the union councils in determining what the group position shall be . . . *or through exercising the option of withdrawing from the union.*"[13]

"If *members* are prevented from taking advantage of their contractual rights bargained for all employees it is because *they have chosen to become and remain union members.*"[14]

"If a member chooses not to engage in this concerted activity and is unable to prevail on the other members to change the rule, *then he may leave the union* and [also] obtain whatever benefits . . . compliance with the union rule by union members tends to promote."[15]

10. 70 LRRM 3107.
11. 70 LRRM 3107, footnote No. 5.
12. 70 LRRM 3108.
13. 70 LRRM 3108, footnote No. 10.
14. 70 LRRM 3109.
15. 70 LRRM 3109-10. For purposes of the present proceeding, it is appropriate to emphasize the Court's express conclusion that

> "That the *choice to remain a member* results in differences between union members and other employees raises no serious issue under Section 8(b)(2) and Section 8(a)(3) of the Act . . ."[16]

The conclusion expressed in *Scofield*,—that union discipline cannot reach an employee who resigns from membership before commiting the act for which the union would seek to fine him,—[17] is in accord with such legislative history as relates to this issue. In fact, the question was not a source of great legislative attention. However, Congress' view as to the limits of unions' disciplinary rights, or, more narrowly, the extent to which unions' disciplinary acts are free of the reach of Section 8(b)(1)(A), is revealed in a confrontation between Senator Taft, a sponsor of the legislation, and Senator Pepper, a leading opponent. According to Senator Pepper, the thrust of the legitimate criticism of 8(b)(1)(A) in his view was that:

> ". . . we do not have to intervene, by means of this legislation, into this internal affair of a union and deny it the right to protect itself against a man *in the union* who betrays the objectives of the union, who violates, perhaps, the constitution of the union or the by-laws of the union, and is convicted by his peers and fellow members of having an antiunion and antisocial attitude toward the workers in that organization."[18] (Emphasis added).

In responding, Senator Taft explained:

> "The pending measure does not propose any limita-

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while a union member may, following his leaving the union, continue to enjoy the benefits which the union has and will secure, that fact does not act as a bar to his right to resign from the union without jeopardy. In this regard, the Court, in balancing the parties' opposing claims, has given effect to the individual's right to act pursuant to his conscience and self-interest in the exercise of his Section 7 guarantee.

16. 70 LRRM 3110.

17. It follows that if an employee shall have the right to escape union discipline by resigning from the union, then his right to resign may not be restricted by the union.

18. 93 Cong. Rec. 4193, II Leg. Hist. 1097.

tion with respect to the internal affairs of unions. They still will be able to fire any *members* they wish to fire, and they still will be able to try any of their *members.*"[19] (Emphasis added).

Thus, the opposition to the enactment of 8(b)(1)(A) was premised on the need to exempt from the statute's coverage a union's right to discipline its *members* and the agreement of Senator Taft was secured that this right to discipline "members" was not affected by the legislation.[20] It is fair to conclude that had Congress intended unions' right to impose discipline to extend not merely to union members but to former members, that desire or intent would have surfaced at some point during the Congressional debates. Moreover, to interpret the existence of such an intent in the face of Congressional silence constitutes a far heavier burden on the legislative debates than the interpretation in *Allis-Chalmers* that Congress, despite its silence, intended to permit fines as discipline when the debates made reference only to expulsion. The imposition of fines upon those who might also, or alternatively, be expelled does not increase the range of persons who were subject to union discipline. Whatever dispute might have existed over the form of discipline which Congress sanctioned, the class of persons who would be affected in any event would be the same, all union "members". While *Allis-Chalmers* converted Congressional silence into acquiescence to what the Court said might be a lesser discipline than Congress expressly permitted, and for the same affected group, the union's object in the instant case is to convert Congressional silence into acquiescence that union discipline may be imposed upon an entire group of persons, non-union members,

19. Ibid.

20. The discipline to which the debates referred was limited exclusively to expulsion from membership. Assuming that Congress intended, without saying so, to include fines as permissible discipline, such fines would, pursuant to the described debates, similarly apply only to "members".

whose discipline by unions Congress did not expressly or impliedly sanction in any form. That is too heavy a burden for the logic or content of the legislative history to support."

Ultimately, the language of *Scofield* which has been quoted here, as well as the interpretation of legislative history which has been urged, derives justification from the content of Section 7 and the Congressional will which that Section expresses to free unconsenting employees from the coercion to engage in strike activity. Whatever interpretation may be accorded to one or another Senatorial pronouncement, the resolution of the question presented here should give maximum effect to the spirit and the terms of Section 7. The holding of the court below failed to do so and essentially repealed the protection contained in that Section whenever a union authorizes a strike. Thus, where a bargaining unit is represented by a union, an employee cannot influence the many decisions which affect his employment rights and duties without joining the union. While a member, if he approves (or perhaps only fails to oppose) a strike, he is bound, according to *Allis-Chalmers*, to continue striking until the union permits him to cease, under threat of expulsion and fine. If he seeks to resign his membership in order to work, then, according to the

21. Further support for the view that Congress intended to restrict union discipline solely to union members derives from the enactment of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 29 U. S. C. Sec. 101(a)(2), (5)). That statute was intended, unlike Taft-Hartley, to regulate unions' internal affairs and recognized unions' right to discipline by fining, suspension, expulsion, "or otherwise", but restricted such discipline to *union members* (Section 101(a)(5)). Similarly, it recognized the right of unions to prescribe reasonable rules whose violation might give rise to discipline, but expressly restricted such rules to those relating to the responsibility of *union members* (Section 101(a)(2)). Congress could hardly have intended to sanction union discipline against non-members by excluding such discipline from the coverage of Section 8(b)(1)(A) of Taft-Hartley, when it failed to articulate such an intention in a subsequent statute expressly intended to govern internal union affairs.

court below, he may similarly be fined and expelled. Only if he fails to join the union in the first instance, thus renouncing the exercise of any influence over his employment destiny, may he enjoy the statutory rights which Congress sought to confer in Section 7.

The Court is urged to reject so total an evisceration of the legislative protection sought to be expressed in that Section.

B.

The Extension of Unions' Disciplinary Power to Non-Members Is Contrary to Congress' Intent and Sound Policy.

To grant unions the right to discipline non-members would violate the Federal scheme whereby the result of economic warfare between the parties should depend upon the will of the parties to continue the conflict. The logic of a strike involves a test of the combatants' resolve to withstand the harm to which such economic warfare necessarily and intentionally subjects the parties; the employer's loss of present and anticipated income is contrasted with employees' loss of salary and fear of replacement. It is at least arguable (and a basis for its reversal) that *Allis-Chalmers* has already effected an unwarranted dislocation of this play of economic forces in compelling union members, through fear of fine as well as expulsion, to continue a strike beyond their desire and ability to withstand its consequences. To permit unions to exercise the same control over those who renounced their membership in order to avoid the continuing harm imposed by this statutorily-recognized form of warfare constitutes clear intervention on one side of the dispute.

The bargaining equality in which Congress sought to leave the parties to a labor dispute has been recognized

by this Court which has held that ". . . the results of the contest [are left] to the bargaining strengths of the parties". *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970). And accordingly to Senator Taft:

> "Our aim should be to get back to the point where, when an employer meets with his employees, they have substantially equal bargaining power, so that neither side feels he can make an unreasonable demand and get away with it." (I Leg. Hist. 1007).

The effect of the decision of the court below granting to unions the right to fine non-members is to promote situations in which unions can make and secure such demands, since it practically prevents the affected employees from ceasing their strike activity, no matter the economic consequences which their strike produced. The result of the court's holding is not merely to permit unions such disciplinary power as to render their strikes effective, but to grant the power virtually to guarantee their success. [22]

That result, apart from its inherent inequity, frustrates the purpose of the Act in that it interferes with the free play of economic forces. It inhibits collective bargaining by placing a restraint on the ability of adverse economic consequences to produce a settlement.[23]

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22. There is now pending in this Court another case which presents a situation in which a lower court has sanctioned an imbalance in the parties' bargaining power by aiding one of the parties in a labor dispute. *United States Chamber of Commerce* v. *Robert Francis, et al.*, No. 71-1554, on appeal from the United States District Court for the District of Maryland, presents the question whether payment by States of welfare benefits to striking employees contravenes Federal labor policy by subsidizing one party to a labor dispute, the striking union, thus deviating from the Congressional requirement of neutrality in private collective bargaining.

The same basic policy of leaving the parties to the consequences of voluntarily undertaken economic warfare is involved in both cases.

23. In this very case the play of economic forces led a number of employees to return to work, a factor whose impact on the

"Collective bargaining works because the parties know that if they didn't move towards an agreement they will get hurt. A strike to be effective must hurt both sides. It is the strike and fear of a strike that causes compromise and agreements . . .'"[24]

According to this Court's decision in *H. K. Porter,* collective bargaining is a system of economic tension based on the parties' respective strength. Artificial supports to one side or the other,—as by governmental subsidies to management, welfare payments to strikers, or the fines involved here, produce results which are unrelated to the parties' strength, their will or resolve, and are thus inconsistent with the legislative design.

C.

Unions Already Possess Adequate Disciplinary Authority in Order to Fulfill Their Legitimate Objectives Without Need for the Extension Sought Here.

Neither the advancement nor protection of unions' legitimate interests requires granting to unions the right to fine non-members for refusing to continue previously undertaken strike activity. Since the granting of such a right to unions necessarily trenches upon the employees' own Section 7 rights, the absence of such a need should preclude the granting of the requested disciplinary power exempt from the reach of Section 8(b)(1)(A).

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ultimate terms on which the parties would resolve their dispute was both natural and consistent with the idea that the effect of the strike's harm—on one party or the other—should affect their bargaining posture. The communicated threat of fines which surely inhibited other employees in this case from resigning union membership and returning to work created an artificial bargaining posture inconsistent with free collective bargaining.

24. Affidavit of Dr. Herbert Northrup, Director of the Industrial Research Unit of the Wharton School of Finance and Commerce, p. 41 (presented to the court in *Francis, et al.*, v. *Davidson, etc., et al.* (unreported, D. Md., 1972), and referred to in the pending Jurisdictional Statement in this Court in *U. S. Chamber of Commerce* v. *Francis, et al.* (No. 71-1554).

The substantial weapons which unions already possess are more than adequate to encourage solidarity and obedience to majority will. As was noted before, where a union has been selected, that union is charged with the responsibility and power to order the employee's entire employment experience. The benefits he receives, the nature of the work he performs, the rules he must obey, the amount of the dues he pays, the decision whether to strike,—are among the decisions made by unions which employees cannot affect absent an opportunity to participate in the unions' deliberations. Expulsion, since it deprives an employee of any manner by which effectively to control his own employment destiny, is therefore an enormously potent weapon possessed by all unions. This conclusion applies not only to strong unions but as well to the "weak" unions about which the Court expressed concern in *Allis-Chalmers*, since even weak unions are charged with the duty to determine economic goals and negotiate working rules for the bargaining unit. Further, expulsion by a union carries with it certain social consequences for the expelled employee whose effect, both on him and his family, can be severe.

In addition to the forfeiture of any role in promoting his own welfare and the effects of social ostracism, an expelled employee would have reason to fear that the union would not protect or enforce his contractual rights in any work dispute which would otherwise entitle him to representation in grievance-arbitration procedures. Even should the union agree to act at all, the employee could hardly expect the most effective or zealous representation. Indeed, to many employees, the interests of management may appear to conflict with their own; in such situations employees will surely be reluctant to commit any acts which would result in the loss of the support and protection of their ally, the union. Such a reluctance, involving psychological as well as practical considerations, would exist whether the union was

strong or not. Finally, expulsion from a union may result in the loss of economic advantages such as the availability of loans, insurance, death benefits and pension plans. Many union pension plans provide for a forfeiture of all invested funds, including those funds provided by the employee exclusively, upon expulsion. In such instances the fear of expulsion will surely, without more, enforce obedience to the institutional will,—the more so as the employee's investment and his seniority increases.

In light of these various considerations, it would appear that the threat of expulsion itself is a sufficiently compelling coercion upon employees to satisfy unions' requirement for an effective disciplinary device to force adherence to their objectives.[25]

If the right to fine union members is added to the right to expel them from membership, the accumulated disciplinary power thus conferred upon unions cannot require augmenting at the cost of a further diminution in employees' Section 7 rights. Rather, for unions to possess and with statutory impunity apply such coercive disciplinary power in order to compel obedience not otherwise freely given may be contrary to the unions' long range interests as it is contrary to the spirit of the Act:

> "Balancing the interests involved, it is likely that whereas genuine pro-strike morale among the bulk of the membership is a factor crucial to the union's ability to call a successful strike, the union has not argued and shown a serious need to substitute for

25. There may well be certain situations, perhaps involving "weak" unions, in which the threat of expulsion will not effectively compel the obedience of the membership. That such situations may exist suggests only that the discipline of expulsion is not absolutely effective, not that it fails to be a reasonable compromise between unions' interests and Section 7 guarantees. Neither the statute itself nor its legislative history requires the conclusion that unions' exemption from the strictures of 8(b)(1)(A) extends to whatever disciplinary coercion is necessary to enforce obedience in even the weakest union.

that morale the power to coerce recalcitrants; absent clear need the NLRA's bias against coercion and in favor of persuasion as the technique of union cohesion seems dispositive. Against the union's interest in an artificial solidarity must be weighed the member's Section 7 interest in freedom from restraint. . . ."[26]

D.

Reliance by the Court Below on the Doctrines of Waiver and Estoppel Was Incorrect.

In approving the union's fines of non-members, the court below reasoned that the employees involved "waived" their right not to strike (i.e., their rights under Section 7), by having voted to strike at the outset, and were "estopped" from discontinuing their strike after it began because other employee-members "relied" on that strike vote in determining to participate in the strike themselves. Such doctrines are inappropriately invoked here.

Basic to the court's decision was the premise that employees should be bound to the consequences of acts and associations voluntarily undertaken. At the outset, the decision to join a union is not voluntary in any traditional sense. As indicated before, an employee must join in order to have any voice in the economic goals which the union seeks in bargaining, including the establishment of a hierarchy of priorities; in the decision as to which cases should be arbitrated and which issues should be pursued in the establishment of work rules negotiated by the parties; in the determination as to the amount of dues to be paid to the union; and in deciding whether the union should strike and whether and when a strike should be terminated by the union. Where a union security clause has been negotiated between the union and the employer, the employee is not informed that he may satisfy the contractual commitment

26. Comment, 80 Harv. L. Rev. 683, 687 (1967).

merely by tendering dues and initiation fees and most collective bargaining agreements containing such clauses refer only to the employee's duty to become a *member* of the union within a fixed number of days.[27] Upon joining the union, an employee becomes subject to constitutions and by-laws which he will surely not have seen, much less read, whose terms will be wholly unfamiliar, and without any right or power to amend any of them or seek union membership conditioned in any way on the omission or modification of any terms or duties required or specified therein.[28]

To speak of voluntary union membership or a voluntary adoption of union's laws or rules has as little relevance to the real world as do the assumptions of the court below

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27. For example, the union security clause involved in *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971), read as follows:

> "All present employees covered by this contract shall become *members* of the [Union] not later than 30 days following its effective date and shall remain *members* as a condition precedent to continued employment. This section shall apply to newly hired employees 30 days from the date of their employment with the Company."

28. The distinction between the limitation on employers' right to withdraw from multi-employer bargaining units and the right employees should enjoy to withdraw from a union at any time traces in part to the fact that an employer's act of joining such an association is in fact voluntary; he knows the conditions and consequences of membership before he joins and his ability to affect his economic destiny does not necessarily depend on his membership. The employee, on the other hand, is faced with a situation where the law makes a union his *exclusive* bargaining agent so that he must join to have a voice on his own behalf, he will have no legal counsel to advise him on his rights and duties prior to joining. More significantly, employees' statutory right to refrain from union activities constitutes an exception to whatever "contract" between the employee-member and the union which may be held to exist. No such statutory exception exists to employers' consensual entry into employer-association arrangements.

Finally, the rules limiting employers' withdrawal from multi-employer units are designed to promote collective bargaining within mutually agreed upon bargaining units, whereas enforceable unions fines imposed on non-consenting non-members impedes free collective bargaining. (See part B, *supra*.)

as to the significance of employees' strike votes. Such votes need not be by secret ballot and frequently are not. Public votes, sometimes by a show of hands, sometimes by voice only, in the course of an emotionally charged meeting, do not and are not designed to elicit the voters' careful and rational consideration. And depending upon the timing of the vote, it may reflect only an attempt to demonstrate the unions' strength during contract negotiations. To rely on such a vote at some time in the future as binding evidence of an employee's prior unqualified intention to strike indefinitely converts fiction into a rule of law.

In general, a waiver of important statutory rights should not be found unless it is express and supported with knowledge of the anticipated consequences, including a renunciation of those rights. In the context of labor relations, neither an employee's decision to join a union, nor the imputed acceptance of the contents of constitutional or by-law provisions, nor his vote to strike at a specific point in time, reflect the kind of informed, voluntary decision which should, as a matter of sound policy, be construed to constitute an unconditional waiver of any statutory rights or protections.

However, even assuming that a vote to strike might, if informed and deliberate, be held to constitute a waiver of statutory rights, there remains the question as to the extent of that waiver. Logic cannot support the assumption that one who votes to strike intends a commitment for the duration of the strike, irrespective of subsequent developments, hardship, passage of time and the parties' changes in position. Not only does the employee make no such unqualified and open-ended commitment when he casts his strike vote, but no other voter could reasonably assume the existence of any such intention for purposes of his own reliance.[29]

29. A contention that an employee who joins a union waives the right to act other than according to the will of the majority is

To hold, as does the court below, that an employee may waive his statutory rights without knowledge or an intention to do so, and that the waiver endures for an unlimited period on the basis of an asserted reliance by others on the unqualified nature of the strike promise where such a reliance cannot in logic exist,—constitutes a conceptual excess which this Court should reject. Since the conclusion reached by the lower court,—permitting unions to fine non-members,—is bottomed on the alleged existence of such an unqualified waiver and assumed reliance by others, the conclusion should be rejected together with the premises which were designed to support it.

CONCLUSION.

For the reasons stated above, together with those additional arguments and authorities raised by the petitioner, it is urged that the Court reverse the decision below.

Respectfully submitted,

MILTON SMITH,
General Counsel,
O. F. WENZLER,
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H. Street, N. W.,
Washington, D. C.,
JERRY KRONENBERG,
BOROVSKY, EHRLICH & KRONENBERG,
120 South LaSalle Street,
Chicago, Illinois 60603,
GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,
Attorneys for the Amicus Curiae.

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unsound for two reasons: first, the nature of the pressures which lead employees to join unions argues against an express willingness to accede to majority will which might be inferred from a more realistically "voluntary" act; second, such a result is incompatible with the continuing viability of Section 7 as applied to any employees who join labor organizations.